Supreme Court, U. S.
FILED
NOV 1 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-562

HAROLD E. RANKIN, JR.,

Petitioner,

vs.

TEXACO INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

DAVID G. YETTER,
PAUL E. EGAN,
3350 Wilshire Boulevard,
Los Angeles, Calif. 90010,
(213) 385-0515,
Counsel for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-562

HAROLD E. RANKIN, JR.,

Petitioner,

vs.

TEXACO INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

Question Presented.

In this civil case, plaintiff and petitioner Harold E. Rankin, Jr. (hereinafter "plaintiff"), contends that the trial court did not take sufficient steps to correct an inadvertent statement that "the jury must be satisfied of the defendant's guilt beyond a reasonable doubt". At the conclusion of the instructions to the jury, plaintiff made no objection to the manner in which the jury instructions were given, or the manner in which the trial court corrected its misstatement. In fact, plaintiff's counsel twice specifically stated that he had no objection to the jury instruction as given.

Thus, the real issue presented in this petition is whether Rule 51 of the Federal Rules of Civil Procedure bars plaintiff's assignment of error.

Statement of Case.

A. Procedural Background.

While the trial court was giving the jury general instructions on direct and circumstantial evidence, it made the following statement (R. Supp. T. 317:3-19):

> "It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence.
>
> The law makes no distinction between direct and circumstantial evidence but simply requires that, before convicting a defendant, the jury must be satisfied of the defendant's guilt beyond a reasonable doubt—Excuse me.
>
> That, ladies and gentlemen, is what I am talking about in the late hours.
>
> Let me restate that to you, ladies and gentlemen. I just defined for you circumstantial and direct evidence.
>
> It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct and circumstantial evidence. The law makes no distinction between direct and circumstantial evidence."

Shortly thereafter, the trial court properly instructed the jury on the burden of proof in a civil case, according to the instructions jointly prepared by the parties (R. Supp. T. 319:1 to 321:7; 323:8 to 324:15):

> "The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence.

If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant.

To establish by a 'preponderance of the evidence' means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have produced them, and all exhibits received in evidence.

In the action for breach of contract, the existence of lease, the agreement of sale, the gasoline shortage—Excuse me. Let me start again.

Ladies and gentlemen, the causes of action here are two. The first one is for breach of contract, and the second one is for fraud. I am first going to discuss with you the cause of action for breach of contract, and then the cause of action for fraud, and then I will instruct you on the damage law as to the contract cause of action and the damage law as to the fraud cause of action.

In the action for breach of contract, the existence of the lease, the agreement of sale, the gasoline storage and withdrawal agreement, and the Texaco travel card agreement between the plaintiff Rankin and the defendant Texaco, for the service

station located at Newport and Victoria, in Costa Mesa, is admitted by the parties.

With respect to this breach of contract, plaintiff Rankin must prove each of the following by a preponderance of the evidence:

One, that plaintiff has fully performed each and every condition and term of the contract on his part to be performed, not waived by Texaco;

Two, that the defendant Texaco breached its agreement with plaintiff by failing to supply him with gasoline as provided by the terms of the agreement of sale;

Three, that plaintiff Harold Rankin suffered damages as a proximate result of the breach of the agreement of sale by defendant Texaco;

Four, the amount of damages suffered by plaintiff Harold Rankin as a result of the breach of the agreement of sale.

If defendant Texaco Inc. is not excused from full performance of the agreement of sale by the terms of that agreement, then Texaco must prove by a preponderance of the evidence that it notified plaintiff Rankin, either orally or in writing, that Texaco would allocate its available gasoline supplies; that it provided plaintiff Rankin with an estimate of what his allocation would be, and that it allocated its available gasoline supply in a fair and reasonable manner.

Now, with regard to the action for fraud and deceit, plaintiff Harold Rankin must prove, with regard to this action, each of the following elements and prove them by a preponderance of the evidence:

First, that the defendant Texaco represented to plaintiff that plaintiff would receive at least 60,000 gallons of gasoline per month to continue the operation of his service station during the voluntary allocation program;

Second, that this representation was false;

Third, that defendant Texaco knew or should have known that the representation was false at the time it was made;

Fourth, that defendant Texaco must have made the representation with the intent to defraud plaintiff; that is, that defendant must have made the representation for the purpose of inducing plaintiff to rely thereon and to act or refrain from acting in accordance with such reliance;

Fifth, that plaintiff must have been unaware of the falsity of such representation when it was made;

Sixth, that plaintiff relied upon the representation and was deceived by it;

Seventh, that the plaintiff was justified in relying upon the representation; and

Eighth, that the false representation was the proximate cause of damage to the plaintiff, and, if so, in what amount.

If you find that the plaintiff has established each of these elements by a preponderance of evidence, then you should return a verdict for the plaintiff. If, on the other hand, you find that the plaintiff has failed to establish any one or more of these elements, then you must find for the defendant with respect to the plaintiff's action for fraud and deceit."

Thus, the jury was properly instructed on the issue of the burden of proof in a civil case.

B. Statement of Facts.

In December, 1969, plaintiff became a Texaco retailer at the service station located at Newport Boulevard and Victoria, Newport Beach, California. The terms of the agreements between plaintiff and defendant-respondent Texaco Inc. (hereinafter "Texaco") were set forth in a Lease (Ex. 1), and Agreement of Sale (Ex. 2), a Gasoline Storage and Withdrawal Agreement (Ex. 3) and a Texaco Retailer Travel Card Agreement (Ex. 4; R.T. 109:9 to 110:23). Texaco supplied plaintiff with gasoline pursuant to the terms of the Agreement of Sale and the Gasoline Storage and Withdrawal Agreement.

Plaintiff sued Texaco for breach of contract for failing to provide plaintiff with 720,000 gallons of gasoline in 1973, the contract maximum set forth in the Agreement of Sale. Texaco's defense was based on a "force majeure" clause contained in the Agreement of Sale, as well as California Commercial Code Section 2615. Plaintiff's cause of action for fraud was based on an alleged representation that plaintiff would receive at least 60,000 gallons of gasoline per month from Texaco during Texaco's voluntary allocation program (R. Supp. T. 229:6 to 235:5).

In response to a worldwide crude oil shortage, on May 10, 1973, the Federal Government announced a "voluntary" program for the allocation of crude oil and refined petroleum products, which was to be administered by the Office of Oil and Gas of the Depart-

ment of the Interior (R.T. 116:2 to 117:2; R. Supp. T. 168:9 to 170:5; Exs. E, F). Pursuant to this allocation program, Texaco was to make available to each of its customers a proportionate share of its available supplies according to each customer's respective purchases during an established base period.

Texaco immediately notified each of its customers, in writing, that it would allocate its available gasoline supplies according to the amount of gasoline each customer purchased during the corresponding month in 1972 (Ex. AF). Plaintiff's notice was personally delivered to his service station on Saturday, May 12, 1973, by his Texaco Marketing Representative (R. Supp. T. 394:10 to 395:8). Beginning in May, 1973, Texaco allocated its available supply of gasoline on a monthly basis (R. Supp. T. 183:5-16; Exs. H, I, J, K, L, M, N, O, P, Q, R, S, T, U, and V). In order to determine each monthly allocation formula, Texaco matched its demand for gasoline (the base period reference month) against its anticipated available supply for that month (R. Supp. T. 178:8 to 180:22). Plaintiff's allocation of gasoline for each month was calculated on the basis of this formula, and he was advised each month of the amount of gasoline Texaco would make available to him (R.T. 398:11 to 401:21; Exs. W, X, Y, Z, AA, AB, AC, and AD).

Throughout 1973, plaintiff received his gasoline on the basis of the same allocation program as all other Texaco customers (R.T. 357:5-15; 413:13-15).

REASONS FOR DENYING THE WRIT.

Plaintiff's Assignment of Error Is Barred by Rule 51 of the Federal Rules of Civil Procedure.

Rule 51 of the Federal Rules of Civil Procedure states:

> ". . . No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and grounds of his objection. . . ."

The purpose of Rule 51 is to prevent unnecessary new trials because of errors the judge might have corrected if they had been brought to his attention at the proper time. *Cohen v. Franchard Corp.* (2nd Cir. 1973) 479 F. 2d 115, cert. denied 414 U.S. 857).

Plaintiff failed to raise any objection to the jury instructions as given, or the manner in which the trial court corrected its misstatement which is now the subject of this appeal. In fact, at the conclusion of the reading of all of the instructions, plaintiff's counsel twice specifically stated, in response to questions from the court, that he had no objections to the instructions as given (R. Supp. T. 332:17 to 334:8). Plaintiff did not raise this issue as error until the motion for a new trial.

Beginning with *Lynch v. Oregon Lumber Co.* (9th Cir. 1939) 108 F. 2d 283, the Ninth Circuit has consistently applied Rule 51 in civil cases. In *Bertrand v. Southern Pacific Company* (9th Cir. 1960) 282 F. 2d 569, cert. denied 365 U.S. 816, the court stated that "whatever the rule may be elsewhere, in this circuit the 'plain error' rule may not be utilized in civil appeals

to obtain a review of instructions given or refused, where the ground asserted was not raised in the trial court."

As the jury instructions given in this case were proper, and on the separate basis that no objection was made by plaintiff as to the jury instructions as given at the time of trial, there is no basis for granting plaintiff's writ in this case.

The Jury Was Properly Instructed on the Issue of Burden of Proof.

The test to be applied in reviewing jury instructions is whether, looking to the instructions as a whole, the substance of the applicable law was fairly and correctly covered. *Pollock v. Koehring* (9th Cir. 1976) 540 F. 2d 425. On this basis, it is clear that the instructions given the jury in this case were proper. The jury was instructed on nine separate occasions in the instructions quoted, that the burden of proof was the "preponderance of the evidence" standard.

Additionally, in at least two cases, it has been held that a reference to a "beyond a reasonable doubt" standard in a civil jury instruction was not error, even when applying a "fundamental error" or "plain error" standard on appeal. In *Talcott v. Midnight Publishing Corp.* (5th Cir. 1970) 427 F. 2d 1277, the appellant complained that fundamental error was committed, to which no objection was raised at the trial court level, when the court included the following words in its charge on burden of proof:

> "By a fair preponderance of the evidence is meant that if you hesitate or are doubtful as to whether your verdict should be in favor of the plaintiff, then the plaintiff has failed to satisfy you by a fair preponderance of the evidence."

The language of the court in *Talcott* is quite significant in the context of this writ. In finding no reversible error, the court stated:

> "We agree that, standing alone, the above words do not accurately reflect a correct statement of the plaintiff's burden of proof in civil litigation. But immediately following this language, the district judge undertook an extensive discussion of the proper standard, employing the classic examples weighing and balancing the evidence and explaining the correct meaning of the preponderence of the evidence. Reading the charge as a whole, it is clear that the jury was more than adequately instructed in proper evaluation of the plaintiff's case. Any harm or confusion which could conceivably have inured from the inaccuracy of the court's initial explanation was obviated by its extensive spelling out of the correct standard. *In addition, we note that the appellants took no specific exception to this portion of the charge under Rule 51 and thus, absent the finding of fundamental error—which we do not perceive here—no grounds for a new trial are presented.* (Citations)." (Emphasis added).

In *McIntosh v. Eagle Fire Co.* (8th Cir. 1963) 325 F. 2d 99, the use of the following jury instruction on burden of proof was held not to be plain error:

> "The court instructs you that while the burden of proof is upon the defendant to establish that plaintiff . . . intentionally set the fire mentioned in the evidence, nevertheless you are instructed that this fact does not need to be established

> beyond a reasonable doubt, but it is sufficient that it is established by the greater weight of the credible evidence."

In affirming the jury verdict, the court held that when consideration was given to the charge as a whole, it did not believe that the burden of proof was so misplaced or overemphasized that the jury was misled, or that the plaintiff's right to a fair trial was prejudiced.

Conclusion.

For the foregoing reasons, a writ of certiorari should not issue to review the judgment and memorandum opinion of the Ninth Circuit.

Respectfully submitted,

DAVID G. YETTER,
PAUL E. EGAN,
Counsel for Respondent.